IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1643 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE M.S.SHAH
AND
HONOURABLE MR.JUSTICE D.H.WAGHELA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MOHAMMED MAJID @ SAKIL MOHAMMED ABID - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
DR MUKUL SINHA WITH MR ROHIT S VERMA for Appellant(s) : 1,
MR RC KODEKAR, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE M.S.SHAH
and
HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 21/10/2005
CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE M.S.SHAH)

This appeal under Section 34 of the Prevention of Terrorism Act, 2002 (hereinafter referred to as “the POTA”) read with the proviso to Sections 49(7) of the POTA and Section 439 of the Code of Criminal Procedure, 1973 is directed against the judgment and order dated 27.6.2005 of the learned Special Judge (POTA) in Criminal Misc. Application No. 1566 of 2005 in POTA Case No. 2 of 2004.

2. The appellant was arrested on 27.11.2003 in connection with the DCB Police I.CR No. 6 of 2003 for the offences punishable under Section 120B, 121, 121A, 122, 123 of IPC, Sections 25(1)(AA), 27 and 29 of the Arms Act and Sections 3(3), 3(4), 20, 21(2)B and 23(3)ab of the POTA.

3. The above offence was registered on the basis of the FIR given by Police Inspector, DCB, Ahmedabad City on 4.4.2003 briefly to the effect that between April 2002 and 3.4.2003, some persons from Ahmedabad had gone to Pakistan to undertake terrorist training and hatched conspiracy in order to take revenge for the losses caused to the life and property of the Muslim community on a very large scale during the communal riots in Gujarat after the Godhra incident.

4. The allegations against the present appellant (accused No. 43 in the aforesaid case) are that the present appellant had harboured accused No. 41 – Ezaz Ahmed @ Mamu and accused No. 40 – Mohd. Wajeed Ahmed at Hyderabad, Mumbai and Karnataka. Said accused Nos. 40 and 41 had taken training at the terrorist camp in Pakistan. After

harbouring accused No. 41 Ezaz Ahmed @ Mamu at his residence at Hyderabad for three days, the appellant had also made necessary arrangements for hiding accused No. 41 and Mohd. Wajeed Ahmed (accused No.40) in Mumbai and Karnataka. Accused Nos. 40 and 41 were associated with Md. Afroz of Ah-Le-Hadees and with M.A. Rawoof. M.A. Rawoof is arrested in the case of assassination of the former Home Minister of Gujarat. The police was, therefore, after accused Nos. 40 and 41 who requested the appellant to provide shelter to them. The appellant provided shelter to them for 4 to 5 days and also discussed the matter with them and promised to help them. The appellant also made arrangements for their stay in Mumbai and Karnataka.

5. It appears that against accused Nos. 40 and 41 and ten other accused, FIR No. 169 of 2003 was also registered at Hyderabad on 19.4.2003 for the offences punishable under Section 121, 121A, 124A, 468, 471, 201 and 212 IPC and Section 12(b) of the Passport Act at CCS Police Station, Hyderabad. That FIR was for the offences of forging passports and taking Muslim boys to Pakistan through different routes like via Bangkok. The present appellant who was accused No. 12 in the said case made the following confessional statement before the Hyderabad Police on 8.10.2003 :-

> "One Md. Afroz of Ah-Le-Hadees is good friend of mine he introduced me with Md. Wajeed R/o Chanchalguda and Aijaz Mamu R/o Chanchalguda. In the month of April 2003 they came to me and told that their boss M.A. Rawoof is arrested in murder case of Gujarat and police is after us and requested to provide shelter to them. On their request I provided them shelter for 4

> to 5 days. Both of them stayed with me and I provided them shelter and discussed with them and promised to help them. When both of them went to Bijapur of Karnataka I went to the Bus depot to see them off. On 1.10.2003 again Md. Wajeed and Sayeed Aijaz Ahmed Mamu came to my house for taking shelter and since then they were staying with me."
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> (emphasis supplied)

6. In the meantime on 4.4.2003, POTA Case No. 12 of 2003 commenced with the filing of FIR by the Police Inspector, DCB, Ahmedabad City. Upon arrest of the five boys from 3.4.2003, it was revealed that some persons from Ahmedabad had gone to Pakistan to undertake terrorist training and hatched conspiracy for creating terror in Gujarat in order to take revenge for the losses caused to life and property of the Muslim community during the communal riots after the Godhra incident. The charge sheet in the said case was filed on 10.9.2003. On 27.11.2003, the present appellant was arrested by the Crime Branch, Ahmedabad by way of a transfer warrant from Hyderabad and was produced before the Special Court, POTA, Ahmedabad on 28.11.2002. The appellant was sent to police remand for a period of ten days. On 9.12.2003, the confessional statement of the appellant-accused was recorded in Hindi before the Deputy Police Commissioner, Ahmedabad City under Section 32 of the POTA which was in the following terms:-

> "... ... ... When we were residing in Saidabad, my brother Sajid's friend Ezaz @ Mamu residing in Chanchalguda used to come to our place to meet my

brother and Wajeed also used to accompany him. That is how Ezaz Ahmed (accused No. 41) and Wajeed (accused No. 40) became my friends. Near our house, there was a shop of Afroz where I used to go sometimes and where his friend Abdul Rawoof Abdul Kadar used to come. He was associated with MIM party. We used to meet at the shop of Afroz. My brother Sajid was also a friend of Afroz. My brother Sajid is an accused in the five year old Hyderabad bomb blast case and is absconding. He has gone to Sharjah ... ... My maternal uncle is associated with Jamate Islami and is well versed with provoking Muslims with his jihadi speeches. In 1992 when the Babri Masjid was demolished, he alongwith some boys was arrested by the police under the TADA. Last year in September, 2002, Afroz had got some video cassettes of communal riots in Gujarat and at Wajeed's place it was shown to muslim youth in Hyderabad in presence of Afroz and Abdul Rawoof. Thereafter in the month of April this year, Ezaz @ Mamu had come to my place and told him that some Hyderabad boys who had gone to Pakistan for terrorist training and had returned were arrested in connection with the assassination of a former Minister of Gujarat. He also told him that he had himself gone to Pakistan for taking terrorist training alongwith ... . During their 35-days training, they were given training of operating fire-arms and making explosive bombs. All the expenses of training were borne by Afroz and Abdul Rawoof. Ezaz @ Mamu had also told the appellant that under apprehension of arrest by the police he has been in hiding and, therefore, the appellant may make

arrangements for his remaining in hiding. In view of the above, I gave him shelter at my place for three days during which period one evening Afroz accompanied by Wajeed came to my place and told me that both these persons were to be made to surrender and that some financial arrangements be made and thereafter Afroz left. At the request of Ezaz @ Mamu, I had asked him to go and stay with my friend Anwar Shaikh at Bijapur in Karnataka. With the help of said Anwar Shaikh, I got a rented house and the rented house was handed over to him (Ezaz @ Mamu) and thereafter when Ezaz @ Mamu contacted me on my mobile and asked me to send Wajeed also, I also sent Wajeed to Bijapur in Karnataka and I also made arrangements for their occupation there.

A month and a half thereafter, both Ezaz and Wajeed returned to Hyderabad and stayed with their relatives. I do not know whether they have relatives. A few days thereafter, Ezaj @ Mamu called me up on my mobile and asked for a shelter. Thereupon, I gave the address of my friend Hakim in Vikarabad and told him to go there. Upon my asking him to do so, Ezaz @ Mamu went to Vikarabad and took a house on rent near Hakim's house. He (Ezaz) also called Wajeed to his place. A few days thereafter, both returned to Hyderabad and were staying with their relatives. A few days thereafter Wajeed met and asked me to make arrangements for his stay in Mumbai. Thereupon I got the arrangements made for his stay in Mumbai through a friend's friend. Wajeed thus stayed in Mumbai for a month and a half

and thereafter he returned to Hyderabad. Then Ezaz @ Mamu and Wajeed both had come to my house when the police arrested all three of us. Thus, I had helped the boys who had returned after terrorist training in Pakistan in remaining in hiding.

This statement I am giving on my free will and not under any threat or inducement."

The appellant was thereafter produced before the learned Chief Metropolitan Magistrate, Ahmedabad on 10.12.2003 at 10.50 AM and the following endorsement was made below the aforesaid statement of the appellant :-

"Accused produced at 10.50 a.m. today.

No complaint of any ill-treatment. Statement is read over to the accused and he admits that he has voluntarily stated the facts before the police and he has signed before me on every page of the statement.

Sd/- CMM"

7. After the appellant was arrested by the Ahmedabad police on 27.11.2003 and after the appellant made the confessional statement recorded under Section 32 of the POTA on 9.12.2003, on 29.1.2004 the Investigating Agency filed the first supplementary charge sheet against the present appellant and others and the same is numbered as POTA Case No. 2 of 2004. The supplementary charge sheet is in the main case being POTA case No. 12 of 2003. When the application filed by the appellant for bail pending trial came up for hearing before the learned Special Judge, POTA, Ahmedabad, the learned Special Judge, POTA considered that

the appellant is a nephew of Maulana Nashiruddin (accused No. 48) who is known for his fiery speeches for Jehad and who is alleged to be sending many boys for training at terrorist camps in Pakistan, that the appellant's brother was instrumental in importing the explosives for the Hyderabad Bomb blasts and has been absconding for the last five years, that the appellant knew that Md. Afroz and M.A. Rawoof were instrumental in sending many boys to Pakistan and Rawoof was a recruiting agent for ISI and introduced to the appellant Ezaz @ Mamu and Mohd. Wajeed (accused Nos. 41 and 40). Ezaz was running away from the police and, therefore, requested for shelter which the appellant gave to him for three days and thereafter the appellant made arrangements for stay of Ezaz and Wajid at Bijapur in Karnataka and also in Mumbai. The learned Special Judge referred to the confessional statement of Ezaz and Wajid indicating that the present appellant had helped them in hiding for a considerable time. The learned Special Judge held that when the appellant is charged for the offences punishable under Section 120B IPC as well as under Section 3(3) and 3(4) of POTA and the appellant having confessed that he had harboured two persons who had consciously and willingly gone to take terrorist training in Pakistan, was sufficient to hold that there was prima facie case against the appellant and, therefore, regular bail was not required to be granted to the appellant. The fact that the appellant's brother, who is allegedly involved in the bomb blast at Hyderabad is absconding since last five years and has settled at Sharjah, was taken as the additional factor against the grant of regular bail to the appellant.

It is against the aforesaid judgment and order dated 27.6.2005 that original accused No.43 is in appeal before us.

8. Before narrating the submissions made on behalf of the appellant, it is necessary to note that since the period of one year after the date of arrest had already elapsed, the learned Special Judge treated the application for regular bail on the touch stone of considerations applicable under Section 439 of the Cr.PC.

9. Dr Mukul Sinha and Mr Rohit Verma for the appellant have raised the following contentions :-

(i) The appellant is alleged to have harboured Ezaz Ahmed (accused No. 41) and Mohd. Wajeed (accused No. 40) at Hyderabad and is arrested in connection with the offence of harbouring the said two persons. For the same offence, the appellant has been arraigned as accused in I CR No. 169 of 2003 at Hyderabad and the appellant has been released on bail pending trial as per the order dated 8.1.2004 of the learned Metropolitan Magistrate, Court No. 21, Hyderabad in Criminal Misc. Petition No. 83 of 2004. The appellant having been enlarged on bail by the Court at Hyderabad, the appellant cannot be kept in detention by the Ahmedabad police for the same offence of harbouring Ezaz @ Mamu and Mohd. Wajeed who are accused Nos. 2 and 4 in the FIR No. 169 of 2003 at Hyderabad.

(ii) The appellant is alleged to have harboured Ezaz and Mohd. Wajeed (accused Nos. 41 and 40) at Hyderabad. The appellant had never come to Gujarat before his arrest pursuant to the transfer warrant obtained form Hyderabad police. Thus, the appellant had not committed any offence within the territorial limits of Gujarat and, therefore, the learned Special Judge, POTA, Ahmedabad had no jurisdiction to try any case against the appellant nor did the Gujarat police have any jurisdiction to arrest the appellant.

(iii) The confessional statement was made when the appellant was in the police custody.

(iv) In any view of the matter, the charge against the appellant is not of having been a part of the conspiracy of sending boys to Pakistan for terrorist training, but only of harbouring accused Nos. 40 and 41 who are alleged to have gone to Pakistan for such training. The appellant is not imputed with any knowledge of accused Nos. 40 and 41 having been accused of any terrorist activity as such. The appellant was not aware of the DCB CR No. 6 of 2003 having been lodged against accused Nos. 40 and 41. In this view of the matter, the provisions of even sub-section (4) of Section 3 were not applicable. The said provision would apply only where a person harbouring or concealing any person knows

that such person is a terrorist. Reliance is placed on the decisions in Kalpnath Rai vs. State, 1998 Cr.LJ 369, Andharaj vs. State of Tamil Nadu, (2000) 9 SCC 45 and in SN Thapa vs. State of Maharashtra, (1994) 4 SCC 38. In view of the decision in NCT of Delhi vs. Navjyot Sandhu, 2005 (7) Judgments Today 1, the confessions of accused Nos. 40 and 41 or other accused can not be relied upon.

(v) Relying on the decision is Giani Pratap Singh vs. State of Rajasthan, (1995) 5 SCC 591, it is submitted that in any view of the matter, since the minimum sentence for the offence punishable under Section 3(4) POTA is three years and the appellant has been in jail since 8.10.2003 i.e. he has completed two years in jail, this is a fit case for releasing the appellant on regular bail as the appellant's mother and a brother in Hyderabad are not keeping well and are required to be looked after by the appellant.

10. On the other hand, Mr RC Kodekar, learned APP has submitted that after the confessional statement was made by the appellant on 9.12.2003, on 10.12.2003 the appellant was taken before the learned Chief Metropolitan Magistrate where the appellant did not make any complaint of ill-treatment and admitted having voluntarily made the statement and the appellant also having made a similar confessional statement before the Hyderabad Police on

8.10.2003, there is sufficient material on record to show the prima facie involvement of the appellant with the conspiracy and also in the act of harbouring accused Nos. 41 and 40, Ezaz and Mohd. Wajeed who had gone to Pakistan for taking terrorist training. The appellant also knew that Mohd. Afroz who is a friend of the appellant and who had introduced accused Nos. 40 and 41 to the appellant is a member of Ah-Le-Hadees and that M.A. Rawoof whom accused Nos. 40 and 41 referred to as their boss, was arrested in a murder case in Gujarat and the police was after accused Nos. 40 and 41 and, therefore, they had sought shelter of the appellant.

11. It is also submitted by the learned APP that the Central Review Committee headed by Hon'ble Mr Justice SC Jain in their report dated 10th May 2005, have recorded the following relevant allegations :-

> "the accused No. 40, 41 and 44 of col. no. 1 under instruction of Rasul Party, the main leader of this conspiracy, by instigation and collusion of accused no. 12 and accused no. 39 of col. no. 2 on basis of bogus documents obtained terrorist training in Islamabad (Pakistan) by travelling from Kolkata to Bangkok then via Karachi to Islamabad and returned on the same route, involved themselves in criminal conspiracy, met aforesaid accused no. 12 and became ready to carry out any work entrusted to them.
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> 10. As part of this offence the accused No. 42 got crossed illegally to Bangladesh border from Kolkata to Bangladesh without passport and visa to accused No. 1, 2, 3, 5 and 11, 17, 18 of col. no. 1 and accused No. 12 of col. no. 2 sent them to Dhaka and arranged for their going for terrorist training at Pakistan and on the same route they brought back accused no. 5, 11, 17, 18

> and aforesaid accused No. 12 col. No. 2. They also illegally got border crossed to Rasul Party, his wife and children from Kolkata to Bangladesh.
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> 11. The accused no. 43 knowing that accused no. 40 and 41 had obtained terrorist training intentionally abetted them in absconding, made arrangements of their stay at Bijapur in Karnataka, helped them financially and thus participated in conspiracy."

The POTA Committee gave findings in favour of ten accused which did not include Accused Nos. 40, 41, 43 and 48. The finding in respect of the remaining accused persons (i.e. including accused Nos. 40, 41, 43 and 48) is as under :-

> "Regarding the remaining accused persons, we find from the confessional statements and the other evidence available against these accused persons, we are of the view that they were very much involved in the terrorist activities and there is ample evidence implicating them under the provisions of POTA in this larger conspiracy case."

12. We first take up contention Nos. (i) and (ii) raised by the learned counsel for the appellant as the same are interconnected. It is true that the present appellant is also an accused (accused No. 12 in Hyderabad) in the criminal case registered with the Hyderabad Police wherein the appellant has been granted bail pending trial by the learned Metropolitan Magistrate at Hyderabad. Apart from the fact that the Hyderabad case does not invoke the provisions of Section 120B IPC and the provisions of POTA, the gravamen of the charge in the Hyderabad case was that on the basis of forged passports, some Hyderabad boys were being taken to Pakistan from Hyderabad via Bangkok. On the

other hand, the charge in the offence registered at Ahmedabad is that the present appellant was a part of the conspiracy in which persons had gone to Pakistan to undergo terrorist training for taking revenge in Gujarat and as a part of that conspiracy, a former Minister of Gujarat State was assassinated in Gujarat. Accused Nos. 40 and 41 are alleged to be members of the team headed by Rawoof (accused No. 12 in Ahmedabad POTA case) who had got assassinated that former Minister of Gujarat. The present appellant (accused No. 43) is found to have been prima facie involved in harbouring accused Nos. 40 and 41 after knowing that accused Nos. 40 and 41 were a part of such conspiracy. The present appellant is also found to have made arrangements for hiding accused Nos. 40 and 41 in Karnataka and in Mumbai.

In view of the above, it cannot be said that the criminal case at Hyderabad and POTA case at Ahmedabad relate to identical facts, merely because in both the cases the present appellant is accused of having harboured accused Nos. 41 and 40 herein (accused Nos. 2 and 4 in the Hyderabad case). The above reasoning is, therefore also, sufficient to repel the appellant's contention that the learned Special Judge, POTA, Ahmedabad has no jurisdiction to try the case against the appellant and also the contention that the Gujarat police did not have jurisdiction to arrest the appellant.

13. As regards the third contention, it is clear from the record that on 10.12.2003 the appellant was taken to the learned Chief Metropolitan Magistrate where the appellant

admitted to have voluntarily made the confession. The appellant had also made a similar confession before Hyderabad police on 8.10.2003 which also supports the prosecution case.

14. As regards the fourth contention, the confession made by the appellant on 9.12.2003 clearly indicates that the appellant was aware of the terrorist nature of the activities being carried on by Ezaz @ Mamu and Mohd. Wajeed (accused Nos. 41 and 40) and the other persons associated with them including Rawoof who is alleged to have been involved in assassination of the former Minister of Gujarat. The allegations against the appellant are also required to be appreciated in the background of the fact that the appellant's brother Sajid was involved in the Hyderabad bomb blast and was absconding as admitted by the appellant in his confessional statement. The appellant not only harboured accused Nos. 40 and 41 in April 2003 and not only made arrangements for their hide-outs at Bijapur in Karnataka and in Mumbai for a quite long period, but the appellant was again found with accused Nos. 40 and 41 at the time of their arrest on 27.11.2003. All these facts emerging from the confessional statement are, therefore, sufficient to come to a prima facie conclusion that the appellant did have the knowledge that accused Nos. 40 and 41 were involved in terrorist activities. Hence, the reliance placed by the learned counsel for the appellant on the decisions in Kalpnath Rai vs. State, 1998 Cr.LJ 369, Andharaj vs. State of Tamil Nadu, (2000) 9 SCC 45 and in SN Thapa vs. State of Maharashtra, (1994) 4 SCC 38 have no relevance to the facts of this case, because in those

decisions, the Court while interpreting the provisions of TADA held that mens rea or knowledge was a necessary ingredient of offence of harbouring even though the language of Section 3(4) of TADA did not provide for mens rea, it had to be read into the provisions of the TADA. The provisions of POTA now expressly provide for these ingredients.

15. The learned counsel for the appellant also relied on the decision in **NCT of Delhi vs. Navjyot Sandhu, 2005 (7) Judgments Today 1,** in support of the contention that a confessional statement of co-accused cannot be used as evidence to implicate another accused. It is, therefore, submitted that the confessional statements of accused Nos. 40 and 41 cannot be relied upon to give any finding against the present appellant. The judgment relied upon by the appellant was rendered after trial and not at the stage of decision on a bail application. However, even proceeding on the basis that the confessional statement of the co-accused is not to be seen even at the stage of deciding bail application, we are satisfied on the reading of the confessional statement of the appellant himself that a prima facie case against the appellant is made out for invoking the provisions of sub-sections (3) and (4) of Section 3 of POTA. In any case, the provisions of sub-section (4) of Section 3 of POTA are clearly attracted.

In this connection, we may refer to the principles laid down by the Hon'ble Supreme Court in **State of Maharashtra vs. Som Nath Thapa, (1996) 4 SCC 659**. The said case involved interpretation of the provisions of Section

120A of the Indian Penal Code, 1860 and also the relevant provisions of TADA Act, 1987. The Hon'ble Court laid down therein that when the ultimate offence consists of a chain of actions, it would not be necessary for the prosecution to establish, to bring home the charge of conspiracy, that each of the conspirators had the knowledge of what the collaborator would do, so long as it is known that the collaborator would put the goods or service to an unlawful use.

16. In the facts of the present case, the appellant having known that accused Nos. 40 and 41 had gone for taking training in Pakistan and that Rawoof (accused No. 12) was a recruiting agent of ISI as indicated to the appellant by accused Nos. 40 and 41 and the nature of training was also narrated by them before the appellant, the appellant not only harboured them for a few days in April 2003,but also helped them and made arrangements for their stay for a number of weeks in Karnataka and in Mumbai and when accused Nos. 40 and 41 returned to Hyderabad, ultimately those two accused as well as the appellant were found together when they were arrested on 27.11.2003. Hence, for invoking the provisions of Sections 3(3) and 3(4), it is not necessary for the prosecution to show that the appellant was actually sending persons to Pakistan for taking terrorist training.

17. As regards the last contention, the minimum sentence for the offence punishable under Section 3(3) of POTA is five years. The accused has undergone sentence for only two years. Apart from that in **Giani Pratap Singh vs. State of Rajasthan, (1995) 5 SCC 591,** one relevant factor

which appears to have weighed with the Court was that the appellant in that case was a priest and was in jail for 4 years and 8 months.

18. It is clarified that the observations in this judgment are made only for the limited purpose of considering the appellant's appeal and prayer for bail pending trial.

19. In view of the above discussion, we do not find merit in any of the contentions raised before us. The appeal is, therefore, dismissed. The Special Court, POTA, Ahmedabad shall complete the trial of POTA Case No. 2 of 2004 as expeditiously as possible.

[M.S. SHAH, J.]

[D.H. WAGHELA, J.]

sundar/-